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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11	TRIPHINA LESLEY,)	Case No. EDCV 16-00584 DDP (DTBx)
12)	
12	Plaintiff,)	ORDER GRANTING DEFENDANT'S MOTION
13)	TO DISMISS FIRST AMENDED
13	v.)	COMPLAINT
14	FAY SERVICING, LLC,)	[Dkt. 11]
15)	
15	Defendants.)	
16)	

Before the court is Defendant Fay Servicing LLC's ("Fay Servicing") Motion to Dismiss Plaintiff Triphina Lesley's First Amended Complaint. (Dkt. 11.) After considering the parties' submissions, the court adopts the following Order.

I. BACKGROUND

The present case is Plaintiff Triphina Lesley's second action against Defendant Fay Servicing in connection with the foreclosure of Plaintiff's home. See Triphina Lesley v. Bank of America, N.A. et al, EDCV 15-01696, 2015 WL 8374950 (C.D. Cal. Dec. 9, 2015). This Court's prior Order in the related action details the basic background of the case (Id.) In brief, Plaintiff obtained a loan

1 from Countrywide Bank, F.S.B. to purchase a home in 2007. (First
2 Amended Complaint ("FAC") ¶ 11.) In 2012, Plaintiff defaulted on
3 her loan, which was then owned by Bank of America, N.A. (BANA).
4 (FAC, Exhibit C.) On February 15, 2015, BANA recorded a Notice of
5 Default and Election to Sell under Deed of Trust ("NOD"). (Id.) On
6 May 6, 2015, BANA recorded a Notice of Trustee's Sale ("First
7 NOTS"), setting the property for sale on June 1, 2015. (Request for
8 Judicial Notice ("RJN"), Exhibit 1.) In May 2015, Plaintiff filed
9 suit against BANA in connection with the default proceedings. (RJN,
10 Exhibit 2.) Defendant Fay Servicing became the servicer of the loan
11 around July 2015, and Plaintiff joined it to the action shortly
12 thereafter. (RJN, Exhibit 3.) On December 9, 2015, this Court
13 issued an order dismissing with prejudice the action against Fay
14 Servicing for failure to state a claim. Lesley, 2015 WL 8374950, at
15 *2.

16 During the course of the prior litigation, a second Notice of
17 Trustee's Sale was recorded on October 28, 2015 (the "Second
18 NOTS"), which set a trustee's sale date of November 30, 2015. (FAC,
19 Exhibit D.) The trustee's sale took place as scheduled on November
20 30. (FAC, Exhibit E.) Prior to trustee's sale, Plaintiff alleges
21 that Defendant failed to process her application for loan
22 modification or notify her regarding the trustee's sale. (FAC ¶¶
23 16, 18.) On the basis of these allegations, Plaintiff filed the
24 present case stating nine causes of action: (1) fraud and
25 intentional misrepresentation; (2) declaratory relief pursuant to
26 Cal. Civil Code §§ 2924.12, 2924(b); (3) violation of Cal. Civil
27 Code § 1788.1 (Rosenthal Fair Debt Collection Practices Act); (4)
28 negligence; (5) violation of Cal. Civil Code §§ 2923.6, 2923.7; (6)

1 statutory damages pursuant to Cal. Civil Code § 2924.19; (7) unfair
2 business practices in violation of Bus. & Profs. Code § 17200; (8)
3 quiet title; and (9) cancellation of trustee's deed upon sale.

4 **II. Legal Standard**

5 A complaint will survive a motion to dismiss when it contains
6 "sufficient factual matter, accepted as true, to state a claim to
7 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
8 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
9 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
10 "accept as true all allegations of material fact and must construe
11 those facts in the light most favorable to the plaintiff." Resnick
12 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
13 need not include "detailed factual allegations," it must offer
14 "more than an unadorned, the-defendant-unlawfully-harmed-me
15 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
16 allegations that are no more than a statement of a legal conclusion
17 "are not entitled to the assumption of truth." Id. at 679. In
18 other words, a pleading that merely offers "labels and
19 conclusions," a "formulaic recitation of the elements," or "naked
20 assertions" will not be sufficient to state a claim upon which
21 relief can be granted. Id. at 678 (citations and internal
22 quotation marks omitted).

23 "When there are well-pleaded factual allegations, a court should
24 assume their veracity and then determine whether they plausibly
25 give rise to an entitlement of relief." Id. at 679. Plaintiff must
26 allege "plausible grounds to infer" that their claims rise "above
27 the speculative level." Twombly, 550 U.S. at 555. "Determining
28 whether a complaint states a plausible claim for relief" is a

1 "context-specific task that requires the reviewing court to draw on
2 its judicial experience and common sense." Iqbal, 556 U.S. at 679.

3 **III. DISCUSSION**

4 **A. California Homeowner Bill of Rights Claims**

5 Plaintiff's second, fifth, and sixth causes of action are
6 based on violations of the California Homeowner Bill of Rights
7 ("HBOR"). Specifically, the FAC alleges that: 1) Defendant executed
8 and recorded a Notice of Default in February 2015 in violation of
9 California Civil Code Sections 2923.5 and 2923.55 (FAC ¶¶ 13, 37);
10 2) Defendant wrongfully foreclosed in violation of Section 2923.6
11 because a modification review was pending as of the November 30,
12 2016 trustee's sale date (FAC ¶¶ 31, 50); 3) Defendant failed to
13 provide Plaintiff a single point of contact ("SPOC") in violation
14 of Section 2923.7 (FAC ¶ 51); and 4) Plaintiff is entitled to
15 declaratory relief and damages for the alleged HBOR violations
16 under Sections 2924.12 and 2924.19 (FAC ¶ 56).

17 With regard to claims arising out of the February 2015 Notice
18 of Default (second cause of action), Defendants argue for dismissal
19 because the document was executed and recorded by BANA not Fay
20 Servicing. (Motion to Dismiss FAC 5.) Indeed, Defendant did not
21 become the servicer of the loan until July 2015. (RJN, Exhibit 3.)
22 Furthermore, Plaintiff's prior action raised the exact same claim
23 regarding the February 2015 NOD against BANA. (RJN, Exhibit 2 ¶
24 18.) Finally, Plaintiff does not contest the accuracy of these
25 statements in their Opposition to the Motion to Dismiss. Thus, the
26 court DISMISSES with prejudice the second cause of action.

27 The remainder of Plaintiff's HBOR claims revolve around two
28 competing characterizations put forth by Plaintiff concerning

1 Defendant's unlawful actions. In her First Amended Complaint,
2 Plaintiff alleges that she had a pending loan modification
3 application prior to the November 30 trustee's sale. (See, e.g.,
4 Compl. ¶¶ 16, 19, 21, 31.) Thus, Plaintiff argues that Defendant's
5 alleged foreclosure of her property, failure to identify a SPOC,
6 and failure to process her modification constituted violations of
7 the HBOR. Defendant challenges this assertion and submits as
8 evidence Plaintiff's modification application, dated December 15,
9 2015, and accompanying email from Plaintiff's counsel delivering
10 the modification application, dated December 23, 2015. (RJN,
11 Exhibit 5.) Because the application was not submitted until after
12 the date of the trustee's sale, Defendant argues that they could
13 not have violated the prohibition on sale while a loan modification
14 application was pending or the SPOC requirement.

15 In her Opposition to the Motion to Dismiss, Plaintiff does not
16 reassert her claim that she had a pending loan modification
17 application at the time of the trustee's sale. Instead, she
18 contends that Defendant failed to postpone the date of the
19 trustee's sale and "failed to communicate with Plaintiff's counsel
20 in an effort to allow Plaintiff an opportunity to submit a loan
21 application." (Opp'n 1.) Plaintiff does not, however, submit any
22 evidence or make any allegation that she requested a postponement
23 of the trustee's sale. Indeed, she cannot make such a showing
24 because her argument rests on the assertion that she never received
25 the Second NOTS. (Compl. ¶ 25.)

26 In its reply, Defendant notes that Plaintiff conceded
27 receiving the initial NOD and the First NOTS and that Plaintiff
28 attached the Second NOTS, which she claims she did not receive, to

1 the First Amended Complaint. (RJN, Ex. 2 ¶¶ 18-19; Reply 5.) None
2 of these facts are dispositive. That Plaintiff was generally aware
3 her home was in foreclosure proceedings and might be subject to a
4 trustee's sale does not mean Defendant's actions with regard to the
5 Second NOTS complied with the relevant statutory requirements.
6 Likewise, the fact that Plaintiff now has submitted the Second NOTS
7 does not mean it was available, as required, prior to the trustee's
8 sale date.

9 Defendant does correctly note, however, that actual receipt of
10 the Notice of Trustee's Sale is not required under California law.
11 See Knapp v. Doherty, 123 Cal. App. 4th 76, 88-89 (2004) ("The
12 trustor need not receive actual notice of the trustee's sale so
13 long as notice is provided to the trustor that is in compliance
14 with the statute."); see also, Kham v. Exec. Tr. Servs., LLC, 2012
15 U.S. Dist. LEXIS 38566, at *25 (E.D. Cal. Mar. 20, 2012) ("[T]he
16 complaint's bare allegation of non-receipt of the trustee's sale
17 notice is insufficient to overcome the presumption of foreclosure
18 sale propriety.") Given the evidence that the Notice of Trustee's
19 Sale was properly recorded, the court DISMISSES with prejudice the
20 fifth and sixth causes of action.¹ In light of the court's
21 conclusion that Plaintiff has failed to state a claim under the
22 HBOR, the court declines to reach Defendant's alternate contention
23 that the HBOR is preempted by the federal Home Owner's Loan Act.
24 (Mot. 7-14.)

25
26 ¹ Plaintiff also asserts an independent claim under California
27 Civil Code sections 2924.12 and 2924.19. These provisions provide
28 remedies for HBOR violation. Having concluded that Plaintiff fails
to state a claim for any violation of the HBOR, the court cannot
conclude that Plaintiff has a separate cause of action under
sections 2924.12 and 2924.19.

1 **B. Intentional Misrepresentation**

2 Plaintiff's First Cause of Action for Intentional
3 Misrepresentation is based on allegations that "Defendants made
4 false representations to Plaintiff regarding the status of her
5 application, the fruitfulness of a potential application,
6 information regarding a sale date, and in representations regarding
7 events that occurred." (FAC ¶ 29.) Plaintiff also specifically
8 alleges that Defendant's counsel stated to Plaintiff "she was
9 unaware of the November 30, 2015 sale date," which led Plaintiff to
10 mistakenly conclude that foreclosure proceedings were not in
11 process. (FAC ¶ 31.)

12 A claim for intentional misrepresentation requires "(1) a
13 misrepresentation; (2) knowledge of falsity; (3) intent to induce
14 reliance; (4) actual and justifiable reliance; and (5) resulting
15 damage." Chapman v. Skype, Inc., 220 Cal.App.4th 217, 230-231
16 (2013). The elements of an action sounding in fraud must be pled
17 with particularity; however, knowledge and intent may be pled
18 generally. Fed. R. Civ. P. 9(b).

19 Defendant argues that Plaintiff allegations are too general to
20 state a claim for fraud or intentional misrepresentation and also
21 immaterial given there was no pending loan application prior to the
22 trustee's sale. (Mot. 17.) Here, the only potentially material
23 allegation is the alleged statement by Defendant's counsel that
24 they were unaware of the sale date. This statement, if true, may
25 have had the potential of misleading Plaintiff about whether the
26 Second NOTS had issued. But Defendant explains, and Plaintiff does
27 not contest, that this statement was made after the trustee's sale
28 date had passed. (Mot. 17-18.) Thus, it does not rise to level of

1 intentional misrepresentation for two reasons. First, it was true
2 at the time it was made; Defendant's counsel filed a declaration
3 stating that they were not tracking this particular proceeding and
4 did not learn of the sale until January 2016. (Declaration of
5 Kathryn A. Moorer.) Second, the statement could not have induced
6 reliance that explains Plaintiff's failure to file a loan
7 modification application prior to the trustee's sale date. Thus,
8 Plaintiff's first cause of action for intentional misrepresentation
9 claim is DISMISSED without prejudice for failure to adequately
10 allege damages resulting from this supposed misrepresentation.

11 **C. California Rosenthal Fair Debt Collection Practices Act**

12 The California Rosenthal Fair Debt Collection Practice Act
13 ("RFDCPA"), like its federal counterpart, is designed to protect
14 consumers from unfair and abusive debt collection practices. See
15 Cal. Civ. Code § 1788.1. Plaintiff's third cause of action alleges
16 that Defendant acted in violation of the RFDCPA. The Complaint
17 contains no allegations about any specific acts by Defendant nor
18 does it contain any allegations that Defendant is a "debt
19 collector" under the RFDCPA. (See FAC ¶¶ 39-41.) Thus, the Court
20 DISMISSES with prejudice Plaintiff's third cause of action.

21 **D. Negligence**

22 Plaintiff's fourth cause of actions alleges that Defendant
23 negligently failed to process Plaintiff's application for loan
24 modification or, in the alternative, negligently failed to postpone
25 the trustee's sale date and work with Plaintiff on a modification
26 application. (FAC ¶¶ 42-47; Opp'n 6.) The elements of a negligence
27 claim are: (1) the existence of a duty to exercise due care, (2)
28 breach of that duty, (3) causation, and (4) damages. Merrill v.

1 Navegar, Inc., 26 Cal.4th 465, 500 (2001). The "existence of a
2 duty of care owed by a defendant to a plaintiff is a prerequisite
3 to establishing a claim for negligence." Nymark v. Heart Fed.
4 Savings & Loan Assn., 231 Cal. App. 3d 1089, 1095 (1991).
5 Defendant contends that Plaintiff's negligence claim must fail
6 because Defendant does not owe Plaintiff a duty of care beyond its
7 role as a lender.

8 Courts have generally held that, under California law, a
9 lender does not owe a fiduciary duty to a borrower. See, e.g.,
10 Walters v. Fidelity Mortg. of California, 730 F. Supp. 2d 1185,
11 1205 (E.D. Cal. 2010). Some courts have applied that logic to
12 circumstances where a loan servicer offers to modify a borrowers
13 loan, reasoning that the servicer's "involvement in the loan
14 transaction does not exceed the scope of its conventional role as a
15 lender of money." Deschaine v. IndyMac Mortg. Servs., 2014 U.S.
16 Dist. LEXIS 8541, at *17 (E.D. Cal. Jan. 22, 2014) (internal
17 quotation marks omitted); see also Nymark v. Heart Fed. Sav. & Loan
18 Assn., 231 Cal. App. 3d 1089, 1096 (1991). That rule, however, is
19 not absolute. California courts employ a six factor test to
20 determine whether a financial institution owes a duty of care to a
21 borrower, and look to "[1] the extent to which the transaction was
22 intended to affect the plaintiff, [2] the foreseeability of harm to
23 him, [3] the degree of certainty that the plaintiff suffered
24 injury, [4] the closeness of the connection between the defendant's
25 conduct and the injury suffered, [5] the moral blame attached to
26 the defendant's conduct, and [6] the policy of preventing future
27 harm." Nymark, 231 Cal. App. 3d at 1098 (citing Biakanja v.
28 Irving, 49 Ca.2d 647 (1958)).

1 California courts are currently divided as to the question
2 whether lenders owe borrowers a duty of care in processing a loan
3 modification. Compare Alvarez v. BAC Home Loans Servicing, L.P.,
4 228 Cal. App. 4th 941, 948 (2014) (holding that lenders have a
5 "duty to use reasonable care in the processing of a loan
6 modification") with Lueras v. BAC Home Loans Servicing, LP, 221
7 Cal. App. 4th 49, 68 (2013) (holding that the defendant banks "did
8 not have a common law duty of care to offer, consider, or approve a
9 loan modification, or to offer [the plaintiff] alternatives to
10 foreclosure.") What appears consistent across cases is that courts
11 have not found a duty of care where plaintiffs never requested a
12 modification. The only case Plaintiff cites in her Opposition rests
13 on the same assumption. See Garcia v. Ocwen Loan Servicing, LLC,
14 2010 WL 1881098, at *4 (N.D. Cal. May 6, 2010) (denying a motion to
15 dismiss a negligence claim against a loan servicer who failed to
16 properly process a modification application "[u]pon receipt of the
17 requested documents"). Thus, the court DISMISSES with prejudice
18 Plaintiff's fourth cause of action.

19 **E. Unfair Competition Law**

20 Plaintiff's seventh cause of actions alleged violation of
21 California's Unfair Competition Law ("UCL"). Cal. Bus. & Prof. Code
22 §§ 17200 et seq. The UCL prohibits "any unlawful, unfair or
23 fraudulent business act or practice and unfair." Id. § 17200.
24 Plaintiff does not state any specific UCL violations but instead
25 alleges that Defendant's actions generally constitute unfair
26 business practices. Having concluded that Plaintiff's allegations
27 regarding Defendant's actions fail to state a claim for violations
28 of the HBOR, intentional misrepresentation, and negligence, the

1 court also DISMISSES without prejudice the seventh cause of action.

2 **F. Quiet Title and Cancellation of Trustee's Deed Upon Sale**

3 Plaintiff's eight and ninth causes of actions seek to quiet
4 title and cancel the trustee's deed upon sale on the grounds that
5 Plaintiff did not receive valid notice of the trustee's sale in
6 violation of California Civil Code sections 2924 and 2924.8. (FAC
7 ¶¶ 63-70; id. 23-25; id. 35-36.

8 To maintain her wrongful foreclosure action, Plaintiff must
9 allege ability to tender. See Alicea v. GE Money Bank, 2009 WL
10 2136969 *3 (N.D. Cal. 2009) ("When a debtor is in default of a home
11 mortgage loan, and a foreclosure is either pending or has taken
12 place, the debtor must allege a credible tender of the amount of
13 the secured debt to maintain any cause of action for wrongful
14 foreclosure.") Likewise, a mortgagor cannot quiet title against a
15 mortgagee without first tendering the amount owed on the mortgage.
16 Miller v. Provost, 26 Cal. App. 4th 1703, 1707 (1994). The tender
17 requirement spares courts from being called upon to "order a
18 useless act performed" in cases where plaintiffs would be unable,
19 even under proper sale procedures, to redeem a property. FPCI RE-
20 HAB 01 v. E & G Investments, Ltd., 207 Cal. App. 3d 1018, 1021-22
21 (1989). Plaintiff has not offered tender here.

22 Plaintiff argues that an equitable exception to the tender
23 rule applies here. (Opp'n 5 (citing Onofrio v. Rice, 55 Cal. App.
24 4th 413, 424 (1997)).) It is true that inequity can create an
25 exception to the tender rule. Farah v. Wells Fargo Home Mortgage,
26 2014 WL 261561, at *3 (N.D. Cal. Jan. 23, 2014). However, it "is
27 generally invoked only when the sale at issue has yet to occur,"
28 since the property would be subject to foreclosure again absent

1 Plaintiff tendering the outstanding debt. Id.; see Nissim v. Wells
2 Fargo Bank, N.A., 2013 WL 192903, at *9 (N.D. Cal. Jan. 17, 2013)
3 (noting that many "courts have refused to extend the tender rule to
4 cases where the foreclosure sale has not yet occurred."). But see
5 Robinson v. Bank of America, 2012 WL 1932842, (N.D. Cal. May 29,
6 2012) at *3-4 (holding it would be inequitable to apply the tender
7 rule to the plaintiff because the sale was still pending). Because
8 the foreclosure sale here was already completed, the tender rule
9 applies and Plaintiff fails to state a claim to quiet title or
10 cancel the trustee's deed upon sale. Further, Plaintiff provides no
11 facts regarding why it would be inequitable to require her to
12 provide tender.

13 Absent any justification for invocation of an exception to the
14 tender rule, Plaintiff's eight and ninth causes of actions are
15 DISMISSED with prejudice.

16 **IV. CONCLUSION**

17 For the reasons set forth above, Defendant Fay Servicing's
18 Motion to Dismiss under Rule 12(b)(6) is GRANTED. Plaintiff's
19 second, third, fourth, fifth, sixth, eighth, and ninth causes of
20 action are DISMISSED with prejudice. Plaintiff's first and seventh
21 causes of action are DISMISSED with leave to amend. Any amended
22 complaint shall be filed by July 11, 2016. Failure to timely file
23 an amended complaint shall result in a dismissal of the entire
24 action with prejudice.

25
26 IT IS SO ORDERED.

27 Dated: June 29, 2016



DEAN D. PREGERSON
United States District Judge